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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
14

15 **STEPHEN ESCONDON MEDINA,**

16 Plaintiff,

17 v.

18 **R. HUESO,**

19 Defendants.
20

Case No.: 08CV0896 JLS RBB

**REPLY TO PLAINTIFF'S
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

Judge: The Honorable Ruben B.
Brooks

21 Defendant R. Hueso respectfully submits the following reply to Plaintiff's Opposition
22 to Defendant's Motion to Dismiss the Complaint in this case. The Complaint should be
23 dismissed because Plaintiff failed to exhaust administrative remedies as required by the Prison
24 Litigation Reform Act.

25 Defendant has proven that Plaintiff has failed to exhaust administrative remedies. (*See*
26 *generally*, Decl of D. Bell and Decl. of T. Emigh.) The Supreme Court had made it abundantly
27 clear that procedural rules, including deadlines for submitting appeals, must be observed to
28 properly exhaust administrative remedies. *Woodford v. Ngo*, 458 U.S. 81, 89, 128 S.Ct. 2378,

1 2385 (2006). In order to exhaust administrative remedies under the California Department of
 2 Corrections and Rehabilitation's procedures, a prisoner must proceed through four levels of
 3 review - one informal and three formal. Cal. Code Regs. tit. 15, § 3084.1(a). In certain
 4 circumstances, the informal level and first formal level of review are bypassed. *Id.* at §§
 5 3084.5(a)(3), 3084.5(b)(1)-(4). For all grievances, however, the administrative process is
 6 completed, or exhausted, only after the inmate receives a decision from the Director of
 7 Corrections. Cal. Dep't. of Corrections Operations Manual, Chpt. 5, § 54100.11 ("Levels of
 8 Review"); *Barry v. Ratelle*, 985 F. Supp. 1235, 1237-38 (S.D. Cal. 1997). Moreover, a prisoner
 9 must submit his initial appeal within fifteen working days of the event complained of. *Id.* at §
 10 3084.6(c).

11 The Declaration of D. Bell indicates that Plaintiff submitted one appeal related to the
 12 allegations in his Complaint. (Decl. of D. Bell ¶¶ 4-6, Exhibit A.) However, the appeal was
 13 filed nearly four months late and was screened out as untimely. (*Id.*) Plaintiff argues that his
 14 attempts to exhaust were unanswered by prison officials and therefore, he should be excused
 15 from the exhaustion requirement. (*See generally*, Pl.'s Opp'n.) This argument, however, is
 16 contrary to Supreme Court precedent requiring proper exhaustion (*Woodford* at 2382), as well as
 17 the Supreme Court's instruction that the federal courts should not read futility exceptions into the
 18 exhaustion requirement where Congress has not provided for them (*Booth v. Churner*, 532 U.S.
 19 731 at 741 n.6 (2002)).

20 Plaintiff indicates that he first filed an appeal on July 24, 2007. (Decl. of Pl. ¶ 3.) He
 21 states he addressed his appeal to "Calipatria Transportation Officers." (*Id.* at 4.) However, per
 22 the regulations, Plaintiff was required to address his appeal to the appeals coordinator. Cal. Code
 23 Regs. tit. 15 § 3084.2(c). It appears Plaintiff was attempting to file an "informal appeal" rather
 24 than a "formal appeal." However, complaints alleging misconduct by staff bypass the informal
 25 level and are to be forwarded directly to the appeals coordinator. *Id.* at 3084.5(a)(3)G). Thus,
 26 Plaintiff has admitted he failed to comply with the procedural requirements.

27 Plaintiff admits the first time he even attempted to file a proper appeal, with the
 28 appeals coordinator, was on August 10, 2007 - almost a month late. (Decl. of Pl. ¶ 6.) Plaintiff's

1 excuse is that he was working to seek the names of the Defendants. However, the regulations, as
 2 currently written, do not require Plaintiff to specifically name each Defendant. *See* Cal. Code
 3 Regs. tit. 15 §§ 3084-3084.7. The Supreme Court, in *Jones v. Bock*, has recently clarified that
 4 exhaustion is not necessarily inadequate because an inmate failed to specifically name the
 5 defendants in his grievance. *Jones v. Bock*, 127 S. Ct. 910, 922 (2007). Moreover, prior to the
 6 *Jones* ruling, this District has held that an inmate's grievance need only put departmental
 7 officials on notice of potential claims. *See Irvin v. Zamora*, 161 F. Supp. 2d 1125, 1134-35 (S.D.
 8 Cal. 2001).

9 Even assuming everything in Plaintiff's declaration is true, he nonetheless fails to
 10 exhaust administrative remedies. The regulations required Plaintiff to submit his appeal to the
 11 appeals coordinator. Cal. Code Regs. tit. 15, § 3084.2(c). Instead, he submitted it to "Calipatria
 12 Transportation Officers." (Decl. of Pl. ¶¶ 3-4, 7.) The regulations required Plaintiff to appeal to
 13 the appeals coordinator within fifteen working days of the event being appealed. Cal. Code
 14 Regs. tit. 15, §§ 3084.2(c), 3084.6(c). Instead, Plaintiff filed his first appeal on August 10, 2007,
 15 almost a month after the July 18, 2007, incident. (Decl. of Pl. ¶ 5.) Plaintiff shows further
 16 evidence that he filed two more appeals that were somehow received by the appeals coordinator
 17 - on September 22, 2007, and on November 12, 2007. (*Id.* at ¶¶ 6, 9, Ex. C, Ex. E.) However,
 18 neither of these appeals contains any information to corroborate the existence of his previous
 19 attempts to appeal. (*Id.*) For example, Plaintiff does not complain that his previous appeals have
 20 gone unanswered. Additionally, the documents entitled "Requests for Interview" contain no
 21 information indicating anyone, other than Plaintiff, even saw them. (*Id.* at Ex. A, Ex. B, and Ex.
 22 D.)

23 In any event, Plaintiff failed to file an appeal utilizing the proper procedures prior to
 24 the deadline. Therefore, in light of the holding in *Woodford v. Ngo*, Plaintiff has failed to
 25 exhaust his administrative remedies and this case should be dismissed. *Woodford* at 458 U.S. 89.
 26 Moreover, because the deadlines to appeal have expired, this case should be dismissed *with*
 27 prejudice. *See Janoe v. Garcia*, 2007 WL 1110914. at * 8-9. (S.D. Cal. March 29, 2007).

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1 Plaintiff cites to several court cases in an attempt to excuse his failure to exhaust.
 2 However, all cases are: (1) distinguishable, and (2) cases this Court is not bound by. First,
 3 Plaintiff cites *Brookins v. Vogel*, 2006 WL 3437482 (E.D. Cal.). In this case, the plaintiff
 4 prisoner claimed he filed a timely inmate appeal that was somehow not received by the appeals
 5 coordinator. *Id.* at * 2. However, the defendants in that case submitted no evidence whatsoever
 6 to dispute Plaintiff's claims. *Id.* at * 3. In the case at hand, Defendant has submitted evidence
 7 proving Plaintiff's failure to file a timely appeal. Moreover, Plaintiff's own evidence, at least the
 8 evidence bearing stamps that it was actually received by someone at the prison, shows he failed
 9 to complain that his prior appeals went unanswered. Additionally, Plaintiff admits he failed to
 10 file an appeal to the appeals coordinator - as required by the rules - within the fifteen day
 11 deadline. (Decl. of Pl. ¶¶ 3-5.)

12 Next, Plaintiff cites *Parker v. Robinson*, 2006 WL 2904780 (D. Me.). In the *Parker*
 13 case, the prisoner plaintiff's grievance was denied because he forwarded it to the wrong party.
 14 *Id.* at * 2. The court denied defendants' exhaustion defense by reasoning that although the
 15 plaintiff made a procedural mistake, they found he was not doing so in an attempt to thwart the
 16 process. *Id.* at * 11-12. However, in *Parker* there was no dispute that the plaintiff timely filed
 17 his initial appeal. *Id.* at * 2. Here, Defendant *does* dispute whether Plaintiff filed a timely
 18 appeal. If the Court were to accept Plaintiff's allegations in this case, any plaintiff prisoner that
 19 failed to timely appeal, could easily argue that they accidentally appealed to the wrong person -
 20 without any evidence that was the case. The only actual appeals (not requests for interview)
 21 attached to Plaintiff's declaration bear dates in September and November - way beyond the
 22 appeal deadline.

23 In an additional attempt to excuse his compliance with the exhaustion process, Plaintiff
 24 cites *Thomas v. Hickman*, 2006 WL 2868967 (E.D. Cal.). In this case there was no dispute
 25 between the parties regarding the evidence of exhaustion. *Id.* at * 7. Instead, the dispute was
 26 regarding the timeliness of a medical appeal that was *discovered* after the fifteen-day deadline
 27 had expired. *Id.* at * 8-9. Here, Plaintiff makes no argument that he did not discover his medical
 28 //

1 injuries until after the fifteen-day deadline to appeal it had expired. Thus, this case is factually
 2 inapplicable.

3 Finally, Plaintiff cites *Hooks v. Rich*, 2006 WL 565909 (S.D. Ga.). In this case, the
 4 issue was whether the prisoner plaintiff's appeal was factually sufficient to exhaust the claims
 5 before the court. *Id.* at * 4. The issue in the case at hand is not whether Plaintiff's appeal is
 6 factually sufficient, but is whether it was timely. Therefore, this case is also distinguishable and
 7 therefore, inapplicable to the case at hand.

8 CONCLUSION

9 In conclusion, Defendant respectfully requests this Court grant the Motion to Dismiss
 10 because Plaintiff failed to exhaust his administrative remedies. Plaintiff failed to follow the
 11 proper procedures and file a timely appeal. Therefore, this case should be dismissed with
 12 prejudice.

13 Dated: September 8, 2008

14 Respectfully submitted,

15 EDMUND G. BROWN JR.
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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Medina, Stephen Escondon v. R. Hueso, et al.**

Case No.: **08CV0896 JLS RBB**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 8, 2008, I served the following documents:

REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

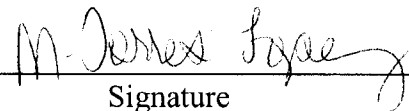
**Stephen Escondon Medina
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In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 8, 2008, at San Diego, California.

M. Torres-Lopez

Declarant


Signature